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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1471 *et al.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioner,

v.

NATIONAL CITIZENS' COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

STATEMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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The Attorney General for the State of Utah hereby submits this statement *amicus curiae* pursuant to Rule 42, 4, of the Rules of this Court, and urges this Court to grant the petitions for certiorari filed in this proceeding because the decision below fails to follow the important decision of this Court in *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and fails to give due consideration to all factors affecting the public interest.

Interest of Attorney General in this Proceeding

The Office of Attorney General is established by the Utah Constitution, Article VII, § 18. Since 1898, it has

been the duty of the Utah Attorney General to act as attorney for the State in "all civil legal matters in which the State is in *anywise* interested" (emphasis added), § 67-5-1-(1), Utah Code Annotated (1953). While it has seldom been the practice of the Attorney General to appeal on behalf of the State of Utah in matters between a private citizen and a federal agency or court, there are some such matters which, because the interest of the State and its citizens is so substantial, compel action by the Attorney General. The instant proceeding is one of those matters.[1]

It is the citizens of Utah who are most directly affected by the quality of radio and television programming offered in Utah. It is the citizens of Utah who would be most affected if the decision of the Court below is allowed to stand. It is the citizens of Utah who would be most directly affected if the licenses of the KSL stations or ownership of the *Deseret News* should pass to non-Utah interests. This is particularly true because of the fact that development and operation of each has resulted from a response from their present ownership to meet the needs of the community and to fill a void when the newspaper, in 1850, and the broadcast stations, beginning in 1922, were organized.

Because of the long record of outstanding public service and professional excellence rendered by the KSL stations over the last 55 years, the KSL stations have earned the

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[1] On July 3, 1975, the Attorney General filed a memorandum in support of the granting of the renewal applications of KSL, KSL-FM and KSL-TV, all licensed to KSL INCORPORATED, one of the parties to this proceeding. The issues raised by the Department of Justice in that proceeding, though more narrowly focused on the specific operations of the KSL stations, are similar to those which underly this proceeding, *i.e.*, whether mere cross ownership of television and newspapers should override the demonstrated record of KSL to serve the public interest of the people residing in the state of Utah.

unquestioned standing as the leading radio and television stations in Utah, responsive to the public need. The *Deseret News*, commonly owned with the KSL stations, has similarly earned premier status and has rendered valuable service to the citizens of Utah over the last 127 years. The requirement, mandated by the decision of the court below, that the owner of the *Deseret News* either relinquish the license of the KSL stations or sell the *Deseret News* would result in a loss of immeasurable magnitude to the citizens of Utah, especially if such ownership were to come to rest with non-Utah interests.

Argument

The decision of the court below requires the Federal Communications Commission, in fulfilling its mandate and obligation to issue broadcast licenses, to adopt a virtually irrebuttable presumption, and to promulgate the presumption into a rule, that diversity of ownership of the media of mass communication (in this case, newspapers and broadcast stations) takes precedence over all other components of the public interest, convenience and necessity. This holding of the court below is based on the belief of the court that diversity of ownership will automatically bring increased competition to the marketplace of ideas in furtherance of the policies underlying the First Amendment and the antitrust laws. The holding of the court below is directly contrary to prior decisions of this Court.

No one disputes that the public interest standard of the Communications Act of 1934 invites reference to the First Amendment and antitrust policies of the United States. However, this Court has repeatedly held that the public interest standard is broader than either of these two policies and requires the exercise of the Commission's expertise to strike the proper balance among all the com-

peting policies which comprise the public interest standard. Not all such pertinent factors were considered by the court below.

As this Court said in *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953):

> "Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest requires in each case a blend of private forces and public intervention.
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> . . .
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> "To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States*, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, cf. *Labor Board* v. *Seven-Up Co.*, 344 U.S. 344, 348, but the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. Although we think RCAC's contention that an applicant must demonstrate tangible benefits is asking too much, it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." 346 U.S. at 93-97.

The presumption required by the holding of the court below is directly in conflict with this doctrine.[2] The Commission's decision in this proceeding recognized both the obligation imposed by the Communications Act and the holdings of this Court in weighing the various factors involved in determining the public interest, convenience and necessity. The court below, however, improperly refused to find itself bound by those requirements.

As this Court also said in the *RCA* case:

> "Whatever the reasons, [for the Commission considering other factors to have outweighed the competitive factor] they are not for us to weigh; it is for us to recognize that encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." 346 U.S. at 93.

Conclusion

Because of the failure of the court below to follow existing precedent of this Court and to consider all factors which affect the public interest, convenience and necessity, the petitions for certiorari should be granted.

Respectfully submitted,

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Amicus Curiae

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[2] See also, *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190 (1943); *U.S.* v. *RCA*, 358 U.S. 334 (1959); *Bowman Transportation, Inc.*, v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974). Ironically, the holding of the court below contradicts its own earlier decisions which agreed with the doctrine pronounced in the *RCA* case. See, *McLatchy Broadcasting Co.* v. *FCC*, 239 F.2d 15 (D.C. Cir. 1956); *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974).